NO. 91-1306

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

-VS-

GUY W. OLANO, JR., AND RAYMOND M. GRAY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether reversible error is committed by allowing the alternates to remain in the jury room during deliberations?

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MAY IT PLEASE THIS HONORABLE COURT, now into Court comes the Appellee, Guy W. Olano, Jr., appearing herein Pro Se and who does file this brief in Opposition to Writ of Certiorari filed by the Solicitor General on behalf of the United States to review a Judgement of the United States Court of Appeals for the 9th Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals reported at 934 F.2d 1425.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

FEDERAL RULE INVOLVED

Federal Rule of Criminal Procedure 24(c) concerning alternate jurors.

PERCEIVED MISTATEMENTS OF FACT

There are several mistatements of fact that must be called to the Court's attention in order to properly review the issues presented to this Honorable Court.

First of all, the Solicitor General would attempt to have this Honorable Court consider the issue solely as to whether to allow alternate jurors to be present during the jury deliberations as automatic reversible error, even when the defense consents to that procedure. It is respectfully suggested that this is an inaccurate formulation of the question as it should be considered by this Honorable Court.

As will be seen here in this brief, and which will be differentiated and distinguished from the cases as cited by the Solicitor General, the facts are clear that in the instant case we did not have a situation where the two alternate jurors went into the jury room and sat throughout the deliberations while a decision was reached by the 12 members of the jury panel. Instead we have a situation where two alternate jurors went into the jury deliberation room after having received their instructions and began to deliberate. Thereafter, on the second day of deliberations one of the alternate jurors asked to be excused, and was in fact excused from any further deliberations. The other alternate stayed in the jury room throughout the deliberations.

So this is not a case where we have one or two alternates go into the jury deliberations and stay with the jury panel throughout the deliberations, but instead have

one juror after listening to one day of deliberations and possibly participating in same, or making facial expressions, gestures, or the like prior to leaving the jury deliberations, walking out and being excused.

The second mistatement of fact is where the Solicitor General states in his question presented to this Honorable Court that the defense consented to that procedure. This too is an inaccurate statement in that at no time during the proceedings at the District Court level did my counsel, Mr. Ken Kanev, nor myself consent to this procedure. In fact, as my brief will show, the only time this issue was discussed and I was present in the Courtroom was when it was decided by counsel for the defendants that the alternates would <u>not</u> go into the jury deliberation room to deliberate. Apparently when this matter was rediscussed in the Courtroom as can be seen from the record I was not present because the Marshals had failed on repeated occasions to bring me into the Courtroom in time prior to there being any discussions on the record.

It is respectfully submitted that these two perceived statements of fact are very important in that they differentiate between the facts contained in the decisions that the Solicitor General uses to present his case to this Honorable Court.

STATEMENT

The trial of this matter was tried before a jury composed of twelve members plus two alternates.

On May 28, 1987 at 4:14 P.M. the jury retired to commence deliberations (RT 10803). Immediately prior to the jury retiring, the Court had the following colloquy with the jurors: (at RT 10802-03)

"We have indicated to you that the parties would be selecting alternates at this time. I am going to inform you who those alternates are ... and since the law requires that there be a jury of twelve, it is only going to be jury of twelve. But what we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to law, the alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to step in having heard the deliberations. But we are going to ask that you not participate. The alternates are Norman Sargent and Shirley Kinsella.

I am going to ask at this time now, Ladies and Gentlemen, that you retire to the jury room and begin your deliberations ... if you will retire to the jury room, please".

(at 4:14 o'clock P.M., the jury retired to commence deliberations)

As is abundantly clear from the trial transcript, the twelve members of the jury and the two alternates went into the jury room and started deliberations. Then on May 29, 1987, according to the District Court Clerk's record of the docket (CR 684):

"Alternate Juror N. Sargent asks to be excused, granted."

So the jury makeup started out with twelve jurors in the jury room deliberating in the presence of the two alternates and then on the next day one alternate leaves the jury room leaving now twelve jurors plus one alternate present. Also on May 29, 1987, the defendant-appellee Mr. Olano was not present at the courthouse or courtroom having the day before waived his presence for jury deliberations of this complex and lengthy case (At RT 10807).

"Mr. Kanev: My client wishes to waive his presence, given his custodial situation".

The Court: Okay"

It is also relevant to note the following dialogue that took place in open court outside of the presence of the jury just prior to the noon recess on May 28, 1987 (RT 10733)

"The court: Do you have your alternate's name? Do you want to give me a slip with it before you leave?

Mr. Westinghouse: Your Honor, we need to discuss it for just another moment.

The Court: How about you all?

Mr. Robison: Can we discuss it over the lunch hour and submit it after lunch, Your Honor?

The Court: Yes, but really do it because at the conclusion of the government's case, I've got to say something or fourteen people are going back in that room. Otherwise, I send fourteen people back in while you decide and that's usually not something anybody wants me to do because we're going to start sending exhibits in and the whole works.

Mr. Robison: We'll meet right now.

The Court: Okay, you can all stay here as long as you need to take care of it. See you back here at 2:00"

(noon recess)

Due to the custodial status of the defendant-appellee, Mr. Olano was taken out of the courtroom and brought up to the Marshal's office and put into the holding cell.

At 2:00 P.M. on May 28, 1987 the afternoon session started, and the following colloquy took place out of the presence of the jury and out of the presence of the defendant-appellee, Mr. Olano, who had not yet been returned to the courtroom by the Marshals. (RT 10736-37).

"The Court: Well, Counsel, I received your alternates do I understand that the defendants now it's hard to keep up with you, counsel. It's sort of a day by day -

but that's all right. You do all agree that all fourteen deliberate? Okay. Do you want me to instruct the two alternates not to participate in deliberation?

Mr. Kellog: It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

The Court: Well, have you told each other who your alternates are?

Mr. Westinghouse: Yes, Your Honor

The Court: Okay, I'll announce it at the end. I'm kind of glad you reached that decision counsel. I kind of think they deserve it. They really have been just a superb jury, and I think they'll be glad."

At no time did the defendant-appellee give his consent to this procedure, on or off the record. This was not the first time during the trial that the Marshals failed to get Mr. Olano into the Courtroom timely as reflected in the transcript at (RT 2-21;320). [See Record Excerpts "F"] In fact, the Judge had to admonish the Marshals on this subject (RT 429-430). [See Record Excerpts "F"] The first time the Court brought up the issue of the alternates going into the jury room was on May 26, 1987 (at RT 10400-401):

"The Court: My last question, and I'd just like you to think about it, you have a day, let me know, it's just a suggestion and you can - if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony and that is to let the alternates go in but not participate but just to sit in on deliberations. Its strictly a matter of courtesy and I know many judges have done it with no objection from counsel. One of the other things it does is if, they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth - unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got

too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know."

Then the next day on May 27, 1987 the Court again addressed the alternates issue where it was agreed in the presence of the defendant-appellee that the alternates not go into the jury room during deliberations. At (RT 10609):

"The Court: Now, the second question is, have you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?

Mr. Robison: We would ask that they not."

REASONS FOR NOT GRANTING THE PETITION

The petition for Writ of Certiorari should not be granted because there is no conflict between the various circuit Court of Appeals on this issue. All of the cases cited by the Solicitor General differentiated and are distinguishable from the factual situation as it is presented in the instant case for the following reasons. As stated previously herein, the two alternates did not stay with the jury throughout their deliberations, but instead after one day of deliberations broke up the sanctity of the jury room by leaving and being excused. On all of the cases cited by the Solicitor General the alternates remained with the twelve jurors until a decision was rendered.

Further, all of the cases cited by the Solicitor General are distinguishable from the instant case in that the only time the issue concerning the alternate jurors was discussed in open court in the presence of the defenant was when all counsel agreed that the alternate jurors not go into the jury room to deliberate. Further discussion that was had in the court room concerning the presence of the

alternate jurors in the jury room was done outside of the presence of myself, and which I had no knowledge of. Therefore, my consent was not only not waived by me, whether explicitly, tacitly or implied, nor was it ever waived by my counsel. As the record reflects, and the Solicitor General states in his brief to this Honorable Court, my attorney objected to the presence of the alternate jurors in the jury room, and no where in the record is it reflected that my counsel agreed to allow the alternates to go into the jury room especially in my presence.

It is well established that "trial by jury" contemplated by Article 3, Section 2, of the Constitution of the United States is a trial by a jury of twelve persons - neither more nor less. Patton v U.S., 281 U.S. 276, 509 S. Ct. 253, 74 L.Ed. 854 (1930).

Rule 23B of the Federal Rules of Criminal Procedure makes it unmistakably clear that a jury shall be of twelve except that the number may be less in the event that the parties so stipulate in writing, but no rule makes provisions for a jury of more than twelve.

The Federal Rules of Criminal Procedure make further provisions for preserving the Constitutional Jury of twelve which a defendant is entitled. Rule 24 (c) in pertinant part provides: "The Court may direct that not more than four (4) jurors in addition to the regular jury be called and paneled to sit as alternate jurors. Alternate jurors in the order that they are called shall replace jurors who, prior to the time the jury retires to consider it's verdict, become unable or disqualified to perform their duties ... an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider the verdict." [emphasis supplied]

The unimbiguous language of Rule 24 (c) and the cases interpreting it have impelled one of the nations most prestigious legal commentators to conclude that: "it is reversible error, even though the defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate". C. Wright, Federal Practice and Procedure, 388 Volume 2 at p. 52 (1969).

It is manifestly clear that the defendant-appellee has a constitutional right to a jury of twelve. In the instant case this constitutional right was violated and should result in a reversal of the defendant-appellee's conviction.

Furthermore, the right of the defendant accused of serious criminal charges to be tried by a jury of properly chosen jurors cannot be waived by an attorney without the defendant's consent. Patton v U.S., supra. The Patton Court said that "the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions that before any waiver can become effective the consent of the government counsel, and the sanction of the Court must be had, in addition to the express and intelligent consent of the defendant. [emphasis supplied].

Patton has since been interpreted to require that the defendant himself, and not merely defendant's counsel approve a stipulation before it operates as a waiver of the defendant's rights respecting the jury that tries him. See U.S. v Virginia Erection Corporations, infra.

The Ninth Circuit Court of Appeals in U.S. v Guerrero Peralta, 446 F.2d 876 (9th Cir. 1971) has ruled on similar issues affecting the jury and has held that the defendant's written consent, or at a minimum, at least

verbal consent, must be obtained and appear on the record. In the case at bar, it is clear that this was not done.

The Court in U.S. v Virginia Erection Corporation, 335 F.2d 868 (4th Cir. 1964) held in a similar case that it was reversible error for the District Court to permit the alternate juror to retire to the jury room with 12 regular jurors when one of the regular jurors appeared to be ill. This was their ruling even though counsel agreed to the procedure, and though the alternate juror was admonished not to participate in deliberations of the jury, and to say nothing. This is analogous to the base at bar. But just as in the Virginia Erection case, and in the case at bar, whether in fact the alternates obeyed the Court's instructions and remained silent can't be seen from the record. However, it is entirely possible and highly probable that their attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors. In any event, the presence of the alternates in the jury room violated the cardinal principle that deliberations of the jury shall remain private and secret in every case. The presence of any other person other than the jurors to whom the case has been submitted for decision impinges upon that privacy and secrecy. It is possible that the alternates may have operated to some extent as a restraint upon the jurors and their freedom of action and expression. The sanctity of the jury was destroyed, and a problem of constitutional dimensions arose.

In U.S. v Essex, 734 F.2d 832 (U.S. Court of Appeals D.C. 1984) this Appellate Court too held that it was plain error for the trial court to permit the alternate juror to retire to the jury room for deliberations with other jurors, even for a period as little as 45 minutes, and even when the alternate says nothing. The Court went on to say that where the Appellate Court determines that plain error has been

made, prejudice is inherent in the error, and the defendant is not required to prove that he is innocent, or that the outcome of trial would have been different if error had not been made. The potential for serious harm and the interest of the defendant and the public in fair, unbiased and secret deliberations are so great that no evidentiary showing of actual prejudice, or of defense counsel's objection to the internal functioning of the jury of which he could not possibly be informed, is required.

In the Solicitor General's brief he states the reasons why the petition should be granted, and uses as his basis the following arguments. He states that the Court of Appeals' decisions conflicts with decisions of other Courts of Appeals holding that violations of Rule 24(c) do not require reversal of a criminal conviction absent a showing of prejudice. It is respectfully submitted to this Honorable Court that these cases as will be discussed herein are distinguishable from the instant case for the reasons previously stated herein.

The Solicitor General also bases his argument on the fact that the decision is also inconsistent with decisions of this Court recognizing that very few trial errors should result in reversal of convictions absent a showing of prejudice to the defendant. The case law is abundantly clear in that cases concerning the issue of alternate jurors inside of a secretive jury deliberation room it is virtually impossible for the defendant to prove the prejudice that occured behind closed doors, especially now years after the trial. And as the Solicitor General finally argues the Court of Appeals decision was inconsistent with the principle that the defendants could not obtain reversal of their convictions based on claims of procedurel irregularity to which their counsel had consented. Again, as is abundantly clear from the record, counsel for Guy W. Olano,

Jr. never consented to the procedure nor did I myself ever consent to the procedure, nor was I ever even aware of the procedure. I was not in the Court room at the time the discussion was continued.

In support of the Solicitor General's argument he cites the following jurisprudence to wit:

1. United States v Reed, 790 F. 2d 208, 210 (2d Cir), cert. denied, 479 U.S. 954 (1986). The Reed case is clearly distinguishable from the instant case in that the alternate juror was permitted to participate in the jury's deliberations and to cast a vote for conviction. Actually this was clearly not the same situation as we have in the instant case where one of the alternate jurors left the jury deliberations after one day of deliberating. The sanctity of the jury room was destroyed when the alternate left after one day of deliberating.

2. United States v Kaminski, 692 F. 2d 505 (8th Cir. 1982). Here too the District Court allowed an alternate jury to sit with the jury during deliberations, but later substituted that alternate for one of the jurors. Again, the underlying factual issues in this case are clearly distinguishable from the case at bar.

It is also very meaningful to note that while the Solicitor General would have this Honorable Court believe that some showing of prejudice must be made in order for their to be a reversal, and uses the jurisprudence stated within their brief to support their position, that it was not until I read the transcripts of the trial that were provided to me after almost one and one half years after the jury's decision, that I learned of the alternate jurors going into the jury room and one of them being excused after one day of deliberations.

The record is clear that I was not in the Court room at the time the Court informed counsel that the alternates were going into the jury room; in fact the only time I was in the Court room to hear discussions concerning the alternates was when it was decided that the alternates not go into the jury room. After that period of time I was not in the Court room at the time that the jury decision was returned. Thereafter, it was not until almost a year and a half later that I was provided with transcripts from an appointed counsel who had not even started to read the transcripts, and therefore I was compelled to handle my appellate brief pro se, did I learn of these irregularities. So for the Solicitor General to state that no prejudice was shown clearly has no merit, and should have no merit in 1992 more than 5 years after the trial of this matter.

I would respectfully represent to this Honorable Court that jurisprudence that has previously been decided by the various Circuit Courts of Appeal are distinguishable and different from the current factual situation before this Honorable Court; and therefore the Petition for the Writ of Certiorari should be denied.

The Solicitor General also addresses the issue that the Constitution of the United States does not mandate a jury of twelve, and therefore allowing alternates to be present during jury deliberations thereby increasing the number of jurors would not be inherently prejudicial to the defendants. Again, factually this is not the case before the Honorable Court. The two alternates did not remain in the jury room during deliberations, however one of the alternates after one day of deliberations got up and left the jury deliberation room. So the issue before the Court is not whether a jury of fourteen can decide a defendant's

fate, but whether after the jury begins to deliberate a juror can get up from the jury room and leave.

The Solicitor General also states that the respondents failed to object to sending the alternates in the jury room. This is clearly a perceived mistatement of fact in that the only time that I was present in the Court room is when we objected to sending the alternates into the jury room. So it is abundantly clear that I did not fail to object to sending the alternates into the jury room nor did my counsel fail to object, because the only time this issue was raised in my presence is when my counsel did object at my insistence that the alternates not go into the jury room. The Solicitor General continues his argument by stating that the respondents did not simply fail to object to allow the alternates to remain with the regular jurors during deliberations; through counsel, they affirmatively consented to that procedure. This again is a misperceived statement of fact in that again and out of an abundance of caution, I would reiterate that the only time that this issue was raised in my presence was when we did object to the alternates going into the jury deliberation room, and that at no time did my counsel affirmatively consent to the procedure. Therefore, the "invited error" doctrine is inapplicable to the instant case.

The Solicitor General would also argue to this Honorable Court that when a defendant is represented by Counsel, that that Counsel has the right to make strategic and tactical trial decisions. This proposition that the lawyer is the agent of his client, and his statements and representations in open Court may be accepted in open Court has an exception; showing gross negligence by the attorney. Failure of my trial counsel to attend the pre-trial conference, and his failure to inform me of the possibility of a hybrid procedure amounted to gross negligence. See

U.S. v McKeon, 738 F. 2d 26, 30 (2d. Cir 1984); and Brown v Wainwright, 665 F.2d 606, 612 (5th Cir. 1982) (en banc).

CONCLUSION

In my appellate brief to the 9th Circuit Court of Appeal I raised 41 assignments of error. Of these assignments of error the 9th Circuit Court of Appeal choose to reverse my conviction on the issue presented herein. The other issues I raised as assignments of error were not considered by the Honorable 9th Circuit Court of Appeal with the exception that the Court did hold that there was insufficient evidence to support my conviction under 18 U.S.C. 14. It is respectfully suggested that the decision by the 9th Circuit Court of Appeal concerning the issue briefed herein was the proper decision, and one that is distinguishable from decisions of other Court of Appeals as specifically enumerated herein. The Petition for a Writ of Certiorari should therefore be denied. I would also pray that this Honorable Court allow me to join in by reference herein to any and all issues and arguments raised by my co-defendant's, Raymond Gray's, counsel before this Honorable Court.

Respectfully submitted,

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